

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DEANGELO VEHICLE SALES, LLC,

Plaintiff,

v.

ADRIAN LEWIS PETERSON,

Defendant.

**ATTORNEY AFFIRMATION IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT
OF CROSS-MOTION FOR
ADDITIONAL DISCOVERY**

Index No. 813400/2018

SCOTT M. PHILBIN, an attorney duly admitted to the practice of law in the State of New York, affirms as follows under penalty of perjury:

1. I am an attorney with the law firm of Bond, Schoeneck & King, PLLC, counsel to Adrian Lewis Peterson ("Peterson") in the above referenced matter, and as such, I am fully familiar with the facts stated herein.

2. I submit this affirmation in opposition to DeAngelo Vehicle Sales, LLC's ("DVS") motion for summary judgment dated August 5, 2019 and in support of Peterson's cross-motion for additional discovery. The motion for summary judgment should be denied pursuant to CPLR Rule 3212(f) because there are undisclosed facts that serve as a defense to the relief sought in the motion.

I. There Are Undisclosed Facts Concerning the Amount Owed On the Note at Issue

3. Plaintiff's motion for summary judgment lacks an affidavit from a representative of DVS swearing to the amount currently due and owing on the loan at

issue. The only evidence offered in support of the motion is the affidavit of Leon McKenzie which at best states that his company, Sure Sports Lending, arranged for a \$5.2 million loan to Peterson that was funded by DVS and that Peterson has “failed and refused to remit any payment on the loan balance”. (McKenzie affidavit at pars. 4 & 9). However, there is nothing in admissible form to certify what amount remains due and owing on the loan. This is important, because upon information and belief, DVS may have already forgiven a large portion of the \$5.2 million loan at issue.

4. Submitted herewith is an affidavit from Dennis T. Chu who is an accountant for Peterson. As set forth in Mr. Chu’s affidavit, in the 2017 tax year, Peterson’s wage and income transcript shows that a form 1099-C cancellation of debt in the amount of Two Million dollars (\$2,000,000.00) was filed with the Internal Revenue Service (“IRS”). (See Chu Affidavit at paragraphs 5-6).

5. Upon information and belief, the 1099-C debt cancellation may have been filed by DeAngelo Vehicle Sales, LLC, as evidenced by the partial creditor name which shows the first four letters of the name as “Dean”. (Note that Adrian Peterson is similarly identified on the transcript as the debtor by the first four letters of his name “Adri”). (See Chu Affidavit at Exhibit “A”).

6. As further evidence that the 1099-C was filed by DVS, the 1099-C also identifies the creditor’s partial address as “2328 A”. Upon information and belief, Paul DeAngelo (the owner of DVS) owns real property at 2328 Aqua Vista Boulevard, Fort Lauderdale, Florida. Your deponent identified this address by searching the Broward County, Florida real property records.

7. Furthermore, it appears that the law firm of McNeese Wallace & Nurrick, LLC charged DVS for the preparation of a memorandum analyzing a debt write off for the loan at issue. (See McNees invoice # 859364 at time entry dated 8/17/18, attached to McKenzie Affidavit as Exhibit "E").

8. All of this evidence demonstrates that DVS may have forgiven at least \$2 million dollars of the \$5.2 million dollar loan in 2017 by filing a 1099-C cancellation of debt. Therefore, DVS may not be entitled to the relief sought in this motion, and specifically, the amount of the judgment being sought herein.

9. There is also a question as to the date on which the cancellation of debt was filed in 2017 because any reduction in principal would reduce interest calculations from that date forward. For this reason, the interest calculations set forth in DVS' motion papers are potentially in error since the calculations fail to account for the debt cancellation.

10. Peterson previously interposed various discovery demands to DVS on or about November 7, 2018. (A copy of which are attached as Exhibit "A").

11. Importantly, these demands sought: all documents associated with the loan at issue; documents from DVS to any governmental institution (including tax documents) relating to the loan; and all evidence of payment on the loan. (See Exhibit "A" at demands numbered 1, 10 and 12).

12. Peterson received responses to the discovery demands on or about December 3, 2018, however, no disclosure was made relating to the filing of the 1099-C cancellation of debt filed with the IRS in 2017.

13. As such, DVS is the only entity in possession of relevant information relating to the possible cancellation of \$2 million of the \$5.2 million loan at issue. Such information serves as a defense to the amount owed on the loan at issue.

14. As such, there is an issue of fact concerning the amount due and owing under the loan and it is respectfully submitted that the motion for summary judgment should be denied pursuant to CPLR Rule 3212(f), and that Peterson should be afforded the opportunity to conduct discovery concerning the cancellation of debt. Such discovery should include the deposition of a DVS representative and the production of documents relating to whether any portion of the loan was cancelled by DVS, including DVS' tax returns for the year 2017.

II. DVS Is Actively Pursuing Another Action Seeking to Recover Money Damages Against an Insurance Policy Issued to Peterson

15. As previously set forth in the papers filed by your deponent on July 19, 2019 in opposition to DVS' emergency motion to compel Peterson's deposition (Docket #40-51), DVS is the plaintiff in a lawsuit venued in the Eastern District of Pennsylvania wherein DVS seeks to recover moneys on an LOV insurance policy issued to Peterson. (A copy of the Pennsylvania Amended Complaint is attached as Exhibit "B").

16. The LOV policy is a professional athlete policy issued to cover accidents and sicknesses resulting in disability. (See Pennsylvania Amended Complaint at paragraphs 6 & 7). Based on an injury Peterson sustained in 2016 the Pennsylvania Action seeks to recover One Million dollars (\$1,000,000.00) plus punitive damages, interest, attorney's fees and costs relating to the denial of a claim submitted under a LOV Policy issued to Peterson.

17. This related lawsuit was never disclosed by DVS during the course of discovery, despite Peterson having served discovery demands seeking documents relating to the loan and any agreement between DVS and Peterson. (See generally Exhibit "A").

18. As previously reported to this Court, the existence of the Pennsylvania case only came to your deponent's attention on July 16, 2109 while preparing for depositions in this case.

19. Upon information and belief, in the event that DVS recovers any funds in the Pennsylvania Action, such funds will be applied by DVS to pay down the loan that is the subject of the case at bar. That makes any recovery in the Pennsylvania Action an offset to the loan at issue, and Peterson should be afforded the opportunity to conduct discovery relating to the facts and circumstances of the LOV claim because it serves as a defense against the amount owed in this action.

20. Simply put, if this Court were to grant judgment to DVS on the full amount sought in this motion for summary judgment, and DVS were to later recover moneys on the LOV Policy in the Pennsylvania Action, DVS could secure two judgments in excess of the loan value.

21. As such, plaintiff's motion for summary judgment should be denied pursuant to CPLR Rule 3212(f), and Peterson should be afforded the opportunity to secure all documents, pleadings and transcripts relating to the Pennsylvania Action, and to conduct a deposition of a DVS representative regarding its pursuit of the LOV claim.

III. Plaintiff's Claim for Attorney's Fees is Not Supported by The Documents Submitted

22. In support of its claim for attorney's fees, DVS submits the affidavit of Leon McKenzie which alleges that "the Note provides that plaintiff DVS can recover its attorney's fees and costs in attempting to collect the money due from Defendant." (McKenzie Affidavit at par. 13). While Mr. McKenzie fails to direct the Court to the relevant provision of the Note to which he refers, it is presumed that he references section 18 entitled "Costs", which states:

Borrower shall be liable to pay all reasonable and necessary Collection Costs, including, without limitation, those relating to reasonable attorney's fees incurred by Lender due to Borrower's failure to make Payment as described herein and/or Lender's enforcement of this Note, whether by court action or otherwise.

(See Note at Section 18 attached to McKenzie Affidavit as Exhibit "A"). [emphasis added]

23. Importantly, the note also defines the "Lender" as DeAngelo Vehicle Sales, LLC. (See Note at page 1, attached to McKenzie Affidavit as Exhibit "A").

24. Based on the terms of the note of issue, in order to collect attorney's fees, plaintiff bears the burden of demonstrating to this Court that that the attorney's fees being sought: 1) were incurred by the Lender (DVS); 2) relate to the enforcement of the note at issue; and 3) are reasonable.

25. Plaintiff's motion seeks the award of attorney's fees in the amount of \$82,950.89, and breaks down the fees as charges from McNeese Wallace & Nurrick LLC (\$24,527.66), Heitner Legal (\$52,200.23) and Law office of Stephen Ghee (\$6,223.00). In addition, plaintiff seeks \$9,000 for this motion for summary judgment.

A. The Invoices from McNees Wallace & Nurrick LLC

26. The McNees invoices appear to be for legal services rendered in connection with a matter labeled “Adrian Peterson Loan Workout”. The invoices do not reference litigation matters to enforce terms of a default and the McNees firm has never appeared as counsel in this action to enforce the note. (See McKenzie affidavit at Exhibit “E”).

27. The McNees invoices show that they were sent to the attention of Paul D. DeAngelo of DeAngelo Vehicle Sales, LLC. As such, the invoices have not been presented to this Court in admissible form because Mr. McKenzie has failed to demonstrate that he has any personal knowledge concerning the existence of these legal invoices, the nature of the services rendered or whether the invoices have even been paid by DVS. Simply put, the invoices were not sent to Mr. McKenzie or his company and as such, he lacks any personal knowledge to attest to the authenticity of the McNees invoices.

28. Furthermore the McNees invoices fail to identify several crucial pieces of information for the Court to determine whether the charges were reasonable. Specifically, the invoices fail to identify:

- a. the professional who performed the work;
- b. the hourly rate being charged by said professional services; and
- c. the number of hours rendered in connection with each service.

29. The McNees bills are at best a block bill by month and lack any information to determine whether the time and amount charged was reasonable and related to the enforcement of the note.

30. Furthermore, many of the services in the McNees invoices contain limited descriptions of the services such as “reviewed correspondence” or “telephone call with”. As such, the Court cannot determine what the correspondence for telephone calls related to, and certainly cannot ascertain whether the correspondence or telephone call related to enforcement of the note. Indeed, there are several time entries that appear to be related to the pursuit of the LOV Policy in the Pennsylvania Action. (See McNees time entries dated 6/1/18 – 6/4/18, 7/27/18 and 7/31/18, attached to McKenzie Affidavit as Exhibit “E”).

31. For all of these reasons, it is respectfully submitted that plaintiff’s motion fails to demonstrate how the McNees invoices are reasonable and necessarily related to the enforcement of the note.

B. The Invoices from Heitner Legal

32. The Heitner legal invoices do not support DVS’ claim for legal fees and frankly raise numerous questions.

33. First, it should be noted that the Heitner Legal invoices were not billed to DVS, rather, the invoices were billed to Sure Sports Lending. (See McKenzie affidavit at Exhibit “D”). As such, on their face, the Heitner Legal invoices demonstrate that DVS has not paid for any of Heitner Legal’s services. Since the note at issue only allows DVS as the “Lender” to recover costs and attorney’s fees, the Heitner Legal invoices are inapplicable having been billed to Sure Sports.

34. Second, the Heitner Legal invoices consist of three invoices numbered 1475, 1476 and 1478. Although the three invoices purportedly relate to time incurred from June 2017 through present, all three invoices are dated July 31, 2019 and show a payment due date of August 15, 2019. As such, the Heitner Legal bills demonstrate that there was no contemporaneous billing by Heitner Legal for services rendered, and the three invoices dated July 31, 2019 appear to have been generated solely for the purpose of this motion in an attempt to support a claim for attorney's fees.

C. The Invoices from the Law Offices of Stephen Ghee, PLLC

35. The Ghee invoices also do not support DVS' claim for legal fees. Specifically, the Ghee invoices were never billed to DVS, rather, the invoices appear to have been billed to either Darren Heitner or Alan Wilmot of Heitner Legal. (McKenzie Affidavit at Exhibit "E").

36. Furthermore, there is no evidence in admissible form that Heitner Legal ever passed these invoices on to DVS for payment or that DVS did in fact pay these invoices.

37. Lastly, the reasonableness of the charges incurred for the Ghee invoices should be questioned by the Court where Mr. Ghee was retained as "local" counsel in a case venued in Buffalo, York and his offices are located in Queens, New York. As such, a large portion of time and related travel charges contained in the Ghee invoices were not reasonable or necessary for the prosecution of this matter.

D. Plaintiff's Claim for \$9,000 in Attorney's Fees for the Motion at Bar Lacks Any Evidentiary Support

38. Plaintiff's motion papers also fails to offer any justification for the time spent on preparing the motion at bar to support the claim for \$9,000 in legal fees.

39. Specifically, plaintiff's motion lacks an affidavit detailing the hourly rate and hours spent on preparing the motion at bar. As such, the Court has not been presented with sufficient evidence to make a determination as to whether the request fees are reasonable and necessary.

WHEREFORE, for all of the foregoing reasons, the Court should deny plaintiff's motion for summary judgment in its entirety, and in the alternative, stay the pending motion for summary judgment to permit Peterson to conduct additional discovery, together with such other and further relief as the Court deems just and proper.

Dated: August 14, 2019



Scott M. Philbin